Sanjung Suria Sdn Bhd v PLB-KH Bina Sdn Bhd

HIGH COURT (PULAU PINANG) — ORIGINATING SUMMONS NO 24NCVC-265–02 OF 2013
S NANTHA BALAN JC
19 JULY 2013

Civil Procedure — Injunction — Fortuna injunction — Injunction to restrain winding up petition — Winding up proceedings used to coerce judgment debtor into paying disputed judgment debt — Stay of execution granted over judgment sought to be enforced — Winding up amounting to abuse of process

Companies and Corporations — Winding up — Stay of proceedings — Whether stay of execution of judgment in civil action apply to winding up proceedings — Whether stay would impede petitioner presenting winding up petition under s 218(1)(e) of the Companies Act 1965 — Whether to grant Fortuna injunction — Companies Act 1965 s 218

This was an application for a Fortuna injunction to restrain the presentation of a winding up petition. The plaintiff was Sanjung Suria Sdn Bhd ('SSSB') and the injunction was sought against the defendant, PLB-KH Bina Sdn Bhd ('PKBSB'). In a previous suit ('the previous suit') PKBSB, as the plaintiff had sued SSSB and had obtained judgment for a sum of RM1,696,862.70 ('the judgment'). SSSB appealed to the Court of Appeal against the judgment and the appeal was still pending. Pursuant to SSSB's application, the High Court granted a stay of execution or enforcement in respect of the judgment ('the stay order'). However, on the very same day when the stay order was made, PKBSB served a notice under s 218(1)(e) of the Companies Act 1965 ('the 218 notice') giving SSSB 21 days to pay the amounts ordered under the judgment. Hence, SSSB filed this application for a Fortuna injunction.

Held, allowing the application with costs in the course of the appeal:

(1) There is no legal impediment to the judgment creditor commencing winding up proceedings notwithstanding the stay order because winding up does not fall within the definition of execution (see para 38).

(2) In the context of the second branch of the juridical basis for a Fortuna injunction, a judgment debt is indisputable, unless set aside or stayed. If the judgment has been stayed pending appeal, then the debt is deemed as a disputed debt. Consequently, any winding up based on that judgment would be an abuse as it would tantamount to winding up based on a disputed debt (see para 48).

(3) Based on the circumstances of this case, the 218 notice and the threat of winding up proceedings had only one purpose, which was to coerce SSSB into paying the amounts ordered under the judgment. That, coupled with the fact that there was a stay order, clearly constituted an abuse of process, warranting intervention by the court (see para 51).

(4) Disallowing the Fortuna injunction would render the stay order given by the other court as an inefficacious and impotent judicial pronouncement. Such an outcome should wherever possible, and depending in the circumstances, be avoided. The grant of a Fortuna injunction on the facts and circumstance of the present case will ensure that such incongruity will not present itself. Further, the fact that special circumstances had been shown and a stay order had been granted by the other court was not without significance and was a relevant factor to be considered in the present application (see paras 54–55).

[Bahasa Malaysia summary

Ini adalah permohonan untuk injunksi Fortuna untuk menghalang penyerahan petisyen penggulungan. Plaintiff adalah Sanjung Suria Sdn Bhd ('SSSB') dan injunksi yang dipohon terhadap defendan, PLB-KH Bina Sdn Bhd ('PKBSB'). Dalam tindakan sebelumnya ('tindakan sebelumnya') PKBSB, sebagai plaintif menyaman SSSB dan telah memperolehi penghakiman untuk sejumlah RM1,696,862.70 ('penghakiman'). SSSB merayu kepada Mahkamah Rayuan terhadap penghakiman dan rayuan masih belum didengar. Berikutan permohonan SSSB, Mahkamah Tinggi membenarkan penangguhan pelaksanaan atau penguatkuasaan berkaitan penghakiman tersebut ('perintah penangguhan'). Walau bagaimanapun, pada hari yang sama apabila perintah penangguhan dibuat, PKBSB menyerahkan notis di bawah s 218(1)(e) Akta Syarikat 1965 ('Notis 218') memberikan SSSB 21 hari untuk membayar jumlah yang diperintahkan di bawah penghakiman. Maka, SSSB memfailkan permohonan ini untuk injunksi Fortuna.

Diputuskan, membenarkan permohonan dengan kos dalam perjalanan rayuan:

(1) Tiada penghalang undang-undang kepada pemiutang penghakiman memulakan prosiding penggulungan walaupun terdapat perintah penangguhan kerana penggulungan tidak terangkum di dalam definisi pelaksanaan (lihat perenggan 38).

(2) Dalam konteks cabang kedua asas juridicial untuk injunksi Fortuna, hutang penghakiman tidak dapat dipertikaikan, kecuali diketepikan atau ditangguh. Jika penghakiman telah ditangguh sementara menunggu rayuan, oleh itu hutang dianggap sebagai hutang yang dipertikaikan. Akibatnya, apa-apa penggulungan yang berdasarkan penghakiman

adalah penyalahgunaan memandangkan ia akan merupakan penggulungan berdasarkan hutang yang dipertikaikan (lihat perenggan 48).

(3) Berdasarkan keadaan kes ini, notis 218 dan ugutan prosiding penggulungan hanya mempunyai satu tujuan, yang mana adalah memaksa SSSB membayar jumlah yang diperintahkan di bawah penghakiman. Ini, bersama dengan fakta bahawa terdapat perintah penangguhan, jelas membentuk penyalahgunaan proses, mewajarkan campur tangan mahkamah (lihat perenggan 51).

(4) Dengan tidak membenarkan injunksi Fortuna akan menyebabkan perintah penangguhan yang diberi oleh mahkamah lain sebagai tidak berkesan dan pengumuman kehakiman yang tidak mempunyai kuasa. Keputusan sedemikian patut di mana saja mungkin, dan bergantung dalam keadaan, dielak. Pemberian injunksi Fortuna atas fakta dan keadaan kes ini akan memastikan bahawa ketidaksesuaian sedemikian tidak akan berbangkit. Selanjutnya, fakta bahawa keadaan khas telah ditunjukkan dan perintah penangguhan telah diberi oleh mahkamah lain adalah bukan tanpa makna dan adalah faktor relevan untuk dipertimbangkan di dalam permohonan ini (lihat perenggan 54–55).]

Notes

For cases on stay of proceedings, see 3(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 1863–1885.

Cases referred to

A Company, Re [1915] 1 Ch 520, CA (refd)

Fortuna Holdings Pty Ltd v Deputy Federal Commissioner of Taxation (1976) 2 ACLR 349 (refd)

Juara Aspirasi (M) Sdn Bhd v Tan Soon Ping [2012] 1 MLJ 50, CA (refd)

Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd and Other Appeals [2001] 4 MLJ 187; [2001] 3 CLJ 248, CA (refd)

Mikien Sdn Bhd v Woolley Development Sdn Bhd [2008] 1 MLJ 823, HC (refd)

Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd [2007] 3 MLJ 316; [2007] 3 CLJ 295, CA (refd)

Multimedia Development Corp Sdn Bhd v Pembinaan Purcon Sdn Bhd [2006] 2 MLJ 653; [2006] 2 AMR 507, HC (refd)

Natseven TV Sdn Bhd v Television New Zealand Ltd [2001] MLJU 511; [2001] 4 AMR 4648; [2001] 4 CLJ 722, HC (refd)

Pacific & Orient Insurance Co Bhd v Muniammah a/p Muniandy [2011] 1 CLJ 947, CA (folld)

RHB Bank Bhd v Gunasingam a/l Ramasingam [2002] 7 MLJ 492, HC (refd)

Solid Kitchen Sdn Bhd v Regal Development Sdn Bhd [1998] 6 MLJ 437; [1998] 3 CLJ Supp 409, HC (refd)

Sri Jeluda Sdn Bhd v Pentalink Sdn Bhd and other appeal [2008] 3 MLJ 692; [2008] 4 CLJ 359, CA (folld)
Westform Far East Sdn Bhd v Connaught Heights Sdn Bhd [2010] 3 MLJ 459; [2010] 2 CLJ 541, CA (refd)

Legislation referred to

Companies Act 1965 ss 218, 218(1)(e), 222

Faridah Ahmad (Faridah Ahmad & Associates) for the plaintiff.
Neoh Hor Kee (BC Teh & Yeoh) for the defendant.

S Nantha Balan JC:

[1] This is an application for a Fortuna injunction to restrain the presentation of a winding up petition. The plaintiff in this application is Sanjung Suria Sdn Bhd ('SSSB') and the injunction is sought as against the defendant, PLB-KH Bina Sdn Bhd ('PKBSB'). For convenience, I have in this judgment, referred to the parties by their abbreviated name, ie the plaintiff herein has been referred to as 'SSSB' and the defendant as 'PKBSB'. This is to avoid confusion because SSSB and PKBSB wear different hats in another action which I will be referring to shortly.

THE BACKGROUND

[2] Previously, in Penang High Court Suit No 22–227 of 2009 ('the suit') PKBSB, as the plaintiff, had sued SSSB for the recovery of certain sums of money. After a full trial, judgment was entered in favour of PKBSB for a sum of RM1,696,862.70, excluding interest and costs ('the judgment'). The judgment is dated 8 November 2012. SSSB lodged an appeal to the Court of Appeal by way of Civil Appeal No P-02–2936–12 of 2012 ('the appeal'). The appeal is still pending. On 31 January 2013, pursuant to an application made by SSSB, the High Court granted a stay of execution or enforcement in respect of the judgment ('the stay order').

[3] In most cases, the matter would have ended there and the judgment creditor would have taken no further steps vis a vis the judgment other than to await the outcome of the appeal. But regretably, that did not happen in this case. On the very same day when a stay order was made by the court, PKBSB served a notice under s 218(1)(e) of the Companies Act 1965 ('the 218 notice') giving SSSB 21 days to pay the amounts ordered under the judgment.

[4] This prompted SSSB to move this court by an originating summons for injunctive and other reliefs. The application was filed on 15 February 2013 which was well within the 21 day period stipulated in the 218 notice. As I said

earlier, principally SSSB has sought to obtain an injunction to restrain PKBSB from presenting a winding up petition.

[5] For completeness, I should mention that PKBSB had lodged an appeal against the stay order. At the time when the decision was made by this court in respect SSSB's application the fate of PKBSB's appeal against the stay order was not known as the appeal had yet to be disposed of.

THE SUIT

[6] The dispute which originated between the parties and which culminated in the judgment arose out of an agreement dated 11 October 2006, ('the first agreement'), wherein SSSB agreed to sell and PKBSB agreed to purchase land owned by SSSB, known as Lot 2767, Bandar Kulim, Kedah ('the said land') at the price of RM11,312,418 subject to the terms and conditions contained therein. Pursuant to the first agreement, PKBSB paid a deposit of RM1,696,862.70 ('the deposit') to account of the purchase price leaving the balance thereof to be paid on the completion date stated therein.

[7] Subsequently, the parties entered into an agreement dated 28 June 2007 ('the second agreement') to rescind the first agreement subject to the terms and conditions contained therein, whereby SSSB was required to refund the deposit to PKBSB upon the happening of certain specified events as provided for under the second agreement. PKBSB maintained that they were entitled to a refund of the deposit whereas SSSB took the contrary view and held on to the deposit. PKBSB filed the suit for recovery of the deposit. SSSB took the stand that the deposit was not due and payable and that PKBSB's suit against SSSB for the refund of the deposit is premature.

[8] After a full trial, the High Court found in favour of PKBSB and allowed the claim in the suit. For the purposes of the present application before me for, inter alia, injunctive relief, it is unnecessary to say anything further about the merits of the parties respective positions vis a vis the refund of the deposit.

[9] All that matters is that the trial court has ruled in PKBSB's favour and SSSB has lodged an appeal to the Court of Appeal. What is material for present purposes is that SSSB has obtained the stay order and are yet faced with the threat of winding up proceedings against them based on the non-payment of the sums payable under the judgment.

THE BASIS FOR A FORTUNA INJUNCTION

[10] In moving this court for an injunction, SSSB's position is that they have appealed to the Court of Appeal against the judgment which has since been

stayed and therefore, the debt is disputed and any winding up proceedings by PKBSB based on non-payment of the sums under the judgment would be an abuse of process.

[11] Further SSSB takes umbrage with the conduct of PKBSB in issuing the 218 notice on SSSB on the very same day when the stay order was made and unequivocally evincing an intention to present a winding up petition based on the 218 notice and non-payment of the judgment sum. According to SSSB, such conduct by PKBSB is a manifestation of an abuse of process.

[12] SSSB are therefore in a precarious position in that they had obtained a stay order and are yet facing a threat of winding up by PKBSB as judgment creditor.

[13] Counsel for PKBSB submitted that as the judgment creditor, PKBSB could lawfully commence winding up proceedings based on the judgment, albeit that the stay order had been granted. He said that notwithstanding the stay order, PKBSB are in law, perfectly entitled to present a winding up petition as the 218 notice had not been complied with and SSSB is therefore unable to pay its debts and deemed insolvent. Finally, he argued that the fact that SSSB has landed assets does not detract from their insolvent status.

THE FORTUNA INJUNCTION

[14] As stated earlier, the type of injunction that SSSB was seeking is known as a Fortuna injunction, which takes its name from the case of *Fortuna Holdings Pty Ltd v Deputy Federal Commissioner of Taxation* (1978) 2 ACLR 349.

[15] A Fortuna injunction is said to be predicated on two separate principles which may form the basis for the grant of an injunction to restrain the presentation of a winding up petition. The juridical basis for an injunction of this type was elucidated by Gopal Sri Ram (JCA) in *Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd* [2007] 3 MLJ 316; [2007] 3 CLJ 295 where he said:

> There is no doubt that a court has jurisdiction and power to grant an anti-suit injunction whenever the interests of justice call for or demand it. So an injunction may be issued by our courts to restrain the institution or prosecution of a suit in a foreign jurisdiction where this would lead to a multiplicity of proceedings. See, *BSNC Leasing Sdn Bhd v Sabah Shipyard Sdn Bhd & Ors* [2000] 2 CLJ 197. Similarly, a party may be restrained from presenting a winding up petition if it is found, for example, that there is a bona fide dispute about the debt on which the notice of demand issued under s 218 of the Companies Act is based. See, *Bina Satu Sdn Bhd v Tan Construction* [1988] 1 MLJ 533; [1988] 1 CLJ 384 (Rep); [1988] 2 CLJ 652; *Stonegate Securities Ltd v Gregory* [1980] 1 Ch 576. Once the debt on

which the proposed petition is based is bona fide disputed it matters not that the debtor company is in fact insolvent. See, *Mann v Goldstein* [1968] 2 All ER 769.

The kind of injunction by which an intended winding up petition is sought to be restrained is known as a 'Fortuna injunction' taking its name from the case in which the juridical basis for the relief was first explained. See, *Fortuna Holdings Pty Ltd v The Deputy Commissioner of Taxation* [1978] VR 83. In that case, McGarvie J discussed the basis on which a court acts to restrain the presentation of a winding up petition and the two branches of the principle that guide courts in the grant of an injunction. In respect of the basis, his Honour said this:

> …
>
> The first branch applies in cases where the presentation of the petition might produce irreparable damage to the company and where the proposed petition has no chance of success …

In respect of the second branch, His Honour said this:

> I consider that there is a second branch of the principle which may apply in situations where the first branch does not.
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> The *second branch* applies in cases where a petitioner proposing to present a petition has chosen to assert a disputed claim, by a procedure which might produce irreparable damage to the company, rather than by a suitable alternative procedure. It may apply in cases where the petition, if presented, has a chance of success. In some cases both the first and the second branches of the principle apply.

In a later passage McGarvie J summed up the two branches of the principle as follows:

> The first branch applies to cases where the petitioner is incapable of success as a matter of law or through absence of supporting evidence. Where the petitioner is not entitled to present a petition or where the ground alleged is not a ground which can found a winding up order, the petition is incapable of success as a matter of law. If there is no sufficient evidence to establish an otherwise sufficient ground, the petition is incapable of success for that reason. Thus the first branch applies where the proposed petition cannot succeed.
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> The second branch applies to cases where there is a more suitable alternative means of resolving the dispute involved in a disputed claim against the company. They are not necessarily cases in which, as a matter of law or through absence of evidence, there is an inherent incapacity of success. They may be cases where the petitioner is entitled to present the petition, the ground is sufficient in law and there is evidence to support the ground. They are cases, though, where, due to the availability of the more suitable alternative remedy, the court hearing the petition would in the circumstances, in the exercise of its discretion, decline to make a winding up order, at least while the circumstances remain as they are at the time of the application for an injunction. Thus the second branch applies where, because of the availability of a suitable alternative procedure, the petition is unlikely to succeed in the circumstances existing at the time.

[16] In the application before me, SSSB's application for a Fortuna injunction is predicated on the second branch of the Fortuna principle.

THE SUBMISSIONS

[17] It was submitted for SSSB that the winding up petition should not be used as a means to enforce payment of alleged debt which is bona fide disputed on some substantial grounds.

[18] SSSB relied on the fact that the judgment obtained by PKBSB against SSSB on 8 November 2012 was in respect of ordinary unsecured debt and is subject to an appeal and lastly that the court has granted the stay order.

[19] Counsel for SSSB cited the following cases in aid of its application for injunctive relief.

[20] The first case relied upon was *Natseven TV Sdn Bhd v Television New Zealand Ltd* [2001] MLJU 511; [2001] 4 AMR 4648; [2001] 4 CLJ 722, where the court had the occasion to consider and determine the burden of proof cast on the plaintiff in an application for interlocutory injunction to restrain the presentation of a winding up petition. The burden of proof was explained in the following words:

> I agree with the reasons given by the English and New Zealand Court of Appeal respectively and by Abdul Malik J and hold that for the purpose of obtaining an interim injunction to restrain the defendant from proceeding with the winding up petition, the burden of proof cast on the plaintiff is only discharged by reference to the standard of proof or test in adducing evidence a prima facie case and that the principle relating to the test of 'serious question to be tried' in *American Cyanamid Co. v Ethicon Ltd* [1975] AC 396; [1975] 1 All ER 504 as applied in *Keet Gerald Francis Noel John v Mohd Noor b Abdullah & Ors* [1995] 1 MLJ 193; [1995] 1 AMR 373 is not applicable as the applications there were not applications to restrain winding up petitions or proceedings, such as in the instant case before me.

[21] Next, reliance was placed on *Multimedia Development Corporation Sdn Bhd v Pembinaan Purcon Sdn Bhd* [2006] 2 MLJ 653; [2006] 2 AMR 507, where a similar application was made to restrain the presentation of the winding up petition on various grounds, one of which was that there was an appeal pending against the summary judgment and that a stay of execution under the said judgment had been granted and therefore the intended winding up petition pursuant to the summary judgment is an abuse of process of court because the debt is a disputed debt until the decision of the Court of Appeal. In that case Abdul Malik bin Ishak J (as he then was) held that since there was a

pending appeal and there was a bona fide disputed debt, it can be said that the intended winding up petition by the defendant is an abuse of process of the court.

[22] Finally, reliance was placed on *Solid Kitchen Sdn Bhd v Regal Development Sdn Bhd* [1998] 6 MLJ 437; [1998] 3 CLJ Supp 409 where it was held as follows:

> But where the debt is disputed, as in this case, being a debt on a judgment subject of a further appeal to a superior court, it certainly cannot be said to be an undisputed debt; and the petitioner cannot at this stage claim to be a creditor of the respondent until that judgment obtained in his favour has become final and conclusive upon the disposal of the appeal. Until then, the debt is sub- judice, and any presentation of the petition in the circumstances is an abuse of process of court, and the court will lend its willing hands to restrain the petitioner from presenting or proceeding of the petition under s 222 of the said Act.

[23] Counsel for SSSB also relied upon decision of the Court of Appeal in *Sri Jeluda Sdn Bhd v Pentalink Sdn Bhd* [2008] 3 MLJ 692; [2008] 4 CLJ 359. However, in *Sri Jeluda* the Court of Appeal had repudiated the approach taken by the High Court in *Solid Kitchen* in utilising s 222 of the Companies Act 1965 to stay the winding up proceedings. The Court of Appeal also stated that a judgment remained a good judgment until it was set aside and the fact that an appeal had been lodged did not establish that the debt was disputed.

[24] As such *Sri Jeluda* did nothing to advance SSSB's case for an injunction. If anything *Sri Jeluda* spoke against the grant of an injunction in circumstances where all that the party seeking an injunction could show was that there was an appeal lodged against the original judgment.

[25] In any event, by way of a fall back argument, it was urged upon me that SSSB has substantial assets which is worth more than RM11,000,000 as opposed to PKBSB's claim of about RM1,700,000 and therefore SSSB cannot be said to be insolvent. Also, it was pointed out that PKBSB has obtained an order to maintain a private caveat on the said land and has custody of the issue document of title of the said land until the judgment sum is paid and/or until disposal of the appeal.

[26] On the other hand, in resisting the application for injunctive relief, counsel for PKBSB strenuously argued that they are entitled to commence winding up proceedings against SSSB as the stay order does not prohibit them from doing so. They said that SSSB had failed to satisfy the basic requirements of a Fortuna injunction.

[27] According to counsel for PKBSB, the crucial elements that must be strictly fulfilled for a Fortuna injunction are (i) a prima facie case that the winding up proceedings will fail ie a bona fide dispute of the debt; and (ii) the 218 notice is an abuse of this honourable court's process. See *Sri Jeluda Sdn Bhd v Pentalink Sdn Bhd* [2008] 3 MLJ 692; [2008] 4 CLJ 359 and *Westform Far East Sdn Bhd v Connaught Heights Sdn Bhd* [2010] 3 MLJ 459; [2010] 2 CLJ 541 (CA), at pp 559–560. It was submitted that SSSB had clearly failed to satisfy either element.

[28] Next, it was said that the debt which arises under the judgment is not and cannot be characterised as a disputed debt as the judgment has been obtained after a full trial and any disputes as to the correctness of the judgment debt have been put to rest as it had merged with the judgment.

[29] In this regard, counsel for PKBSB relied upon the following passage in *Pacific & Orient Insurance Co Bhd v Muniammah a/p Muniandy* [2011] 1 CLJ 947 (CA) at p 958 where it was said:

> Upon the respondent obtaining the judgment against the insured, the debt ceased to be a disputed debt. Thereafter the question whether the debt or amount due was bona fide disputed became non-issue. This is so even though the appellant had filed an appeal against the said judgment because the filing of an appeal does not have the effect of reverting the status of the judgment debt to its original status as a disputed debt before judgment was obtained. The filing of an appeal does not make a valid and enforceable judgment a disputed debt …

[30] Thus, according to counsel for PKBSB, SSSB had failed to even satisfy the first and most crucial element of a Fortuna injunction. According to PKBSB, the debt under the judgment is final and indisputable by any measure and that SSSB's appeal has no effect upon it. Consequently, as the debt is indisputable, SSSB's solvency is a non-issue, especially considering that 21 days have lapsed since the due service of the 218 notice.

[31] The following passage in *Pacific & Orient Insurance Co Bhd* (CA), at p 962 was also cited in aid of PKBSB's proposition:

> When the debt is clearly established it follows that the court would not in general at any rate, interfere even though the company would appear solvent (see *Mann v Goldstein*. Vaisey J once said in the case of *In Re A Company* [1950] 94 SJ 369: Rich men and rich companies who did not pay their debts had only themselves to blame if it were thought that they could not pay them.

[32] Next, it was submitted that the 218 notice was not an abuse of process and any winding up proceedings based upon it is not an abuse of process. According to PKBSB, they are fully entitled to commence winding up

proceedings even though there is a stay order. This is because winding up proceedings are not execution proceedings that are caught by the ambit of the stay order. Winding up proceedings operate as a separate jurisdiction altogether that is exercised by the winding up court rather than the trial court. Winding up orders can be granted without placing the petitioner therein in contempt notwithstanding the presence of the stay order.

[33] PKBSB relied upon *Juara Aspirasi (M) Sdn Bhd v Tan Soon Ping* [2012] 1 MLJ 50 (CA), at pp 54–55 where it was said that:

> … even if there was an ad interim order in place, there was no legal impediment for the petitioner to file a winding up petition against the company. An ad interim stay does not mean that a winding up petition cannot be filed as …winding up proceedings was not within the ambit and meaning of 'execution' proceedings as provided by O 46 r 1 of the Rules of High Court 1980 which states as follows: In this Order, unless the context otherwise requires, 'writ of execution' includes a writ of seizure and sale, a writ of possession and a writ of delivery.
>
> The fact that it is based on a judgment does not necessarily make it a continuation of the existing proceedings. It is a proceeding by way of petition just like divorce, winding up or election to name a few, bears the characteristics of a fresh proceeding unlike an execution proceeding. This principle is equally applicable to winding up proceedings.

[34] In *Re A Company* [1915] 1 Ch 520, the question before the Court of Appeal was whether the execution on a judgment included the petition of winding up of a company. Lord Cozens-Hardy MR said at p 525:

> Now 'execution on the Judgment' is a technical term. It is a legal process by which the judgment creditor, in that character and for his sole benefit, by a proceeding in the same action seeks to satisfy his judgment wholly or partially. I think it is plain that a winding up petition is not execution on a judgment. It lacks almost every element of such an execution.

[35] The following cases where also cited for the proposition that execution does not include winding up.

Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd & Other Appeals [2001] 4 MLJ 187 at p 199; [2001] 3 CLJ 248 (CA), at p 260:

> But a petition for winding up is not execution. For a winding up petition is not based upon any judgment of a court. Normally, it is based on the inability of a company to pay its debts as and when they fall due. Such inability is normally evidenced by the company's inability to satisfy or compound a notice of demand issued pursuant to s 218 of the Companies Act. But the issuance of such a notice is not a sine qua non for the presentation of a winding up petition. What is needed is compelling evidence of the company's inability to pay its debts as and when they fall due.

Mikien Sdn Bhd v Woolley Development Sdn Bhd [2008] 1 MLJ 823, at p 830:

> A petition to wind up a company is therefore wholly independent of any other civil actions that a party may commence against the petitioner. Essentially a winding up petition is an action ad rem commenced not only for the personal benefit of the petitioner but for other creditors and contributories which may have an interest in the company. In the event that a winding up order is made, the petitioner would not be entitled absolutely to the assets of the company if any. It would have to share them with the other creditors.

See also *RHB Bank Bhd v Gunasingam a/l Ramasingam* [2002] 7 MLJ 492 at p 498:

> A creditor who petitions the court to wind up a company under s 218(e) of the Companies Act 1965 is not exercising his right in personam to execute a judgment debt against the company as he would in an execution proceeding, but merely his right in rem to claim against the assets of the company along with other creditors whom the company may be liable to upon being wound up. To quote Phillimore LJ in *Re A Company* [1915] 1 Ch 520 at p 528, a view affirmed by the Court of Appeal in *Re International Tin Council* [1988] 3 WLR 1159:
>
> > In some general loose sense an unsatisfied creditor may be said to be enforcing his judgment by presenting a petition for a winding up. But, except that his judgment is evidence of his debt, a judgment creditor is in no better position for a winding up than any other creditor. She is not therefore seeking to enforce her judgment. She is proceeding to a new alternative mode of recovering her debt, a mode which she no longer seeks to recover for herself alone but for the benefit of all the creditors.
> >
> > It follows therefore a stay of execution of a judgment in a civil action should not impede a petitioner presenting a winding up petition under s 218(1)(e) of the Companies Act 1965.

[36] It was submitted that based on the principles as enunciated in the abovementioned cases, PKBSB is fully entitled to present a winding up petition and even obtain a winding up order if need be notwithstanding that there is in existence a stay order as the 218 notice and that any winding up proceedings based upon it is not an abuse of process.

ANALYSIS OF THE LAW AND FACTS

[37] The basic and fundamental premise is that an order of court including one which is in the nature of a stay of execution/enforcement has to be obeyed by all parties, particularly the judgment creditor. Hence, in the ordinary course of events, once a stay order is made, the judgment creditor is precluded from taking any form of execution or enforcement proceedings against the judgment debtor.

[38] I am in agreement with counsel for PKBSB, when he submitted that there is no legal impediment to the judgment creditor commencing winding up proceedings notwithstanding the stay order because winding up does not fall within the definition of execution. This proposition has been made abundantly clear by the cases that have been cited to me by PKBSB's counsel on the restrictive definition of the word 'execution'.

[39] However, the definition of execution, which excludes winding up, in and of itself does not provide the answer to the present legal issue, ie whether this court has power and jurisdiction to consider and allow, if it thinks fit, an injunction to prevent the presentation of a winding up petition in circumstances such as the present one where there is a stay order.

[40] As such, when the judgment debtor, as SSSB has done, seeks additional protection and prays for an order to restrain the presentation of a winding up petition in a situation such as this, where a stay order has been granted, it would, in my view, be necessary to consider the effect that the stay order would have on an application for injunction. The view that I take on this is that the fate of the application for an injunction does not (and indeed cannot) rest merely on the restricted definition given to the word execution and/or the fact that there is a valid judgment in favour of PKBSB.

[41] In my view, it is not just necessary but imperative for this court to take cognisance of the fact that SSSB has (*or at any rate must have*) satisfactorily discharged their burden and demonstrated to the trial court that there were special circumstances which warranted the exercise of discretion by that court to grant the stay order.

[42] I also take cognisance that a stay of execution of a monetary judgment is rarely granted. What PKBSB had obtained was a monetary judgment against SSSB. However, SSSB managed to convince the trial judge that there were special circumstances and consequently the stay order was made. It should be mentioned that whilst the aspect of special circumstances had not been alluded to by either of the parties in the affidavits or submissions, this court had nevertheless raised the issue before the parties and heard them before making a decision.

[43] Quite predictably, PKBSB's counsel submitted that special circumstances are irrelevant when this court is considering an application for an injunction to restrain the presentation of a petition based on a judgment debt. On the other hand, SSSB's counsel stated that the fact that SSSB had satisfied the other court of the existence of special circumstances is a very relevant factor to be considered by this court when dealing with the application for an injunction to restrain the presentation of a winding up petition.

[44] In my view, the key issue is whether the application by SSSB for a Fortuna injunction falls in limine by virtue of the fact that PKBSB is armed with a valid judgment of a court of competent jurisdiction and that it is not capable of being called into question under the guise of a disputed debt which is a *sine qua non* for a Fortuna injunction. The issue rests squarely and entirely on whether there is a bona fide dispute over the debt.

[45] Of course, in *Solid Kitchen Sdn Bhd v Regal Development Sdn Bhd* [1998] 6 MLJ 437; [1998] 3 CLJ Supp 409 the High Court had held that a judgment which is being appealed against is, ipso facto, to be regarded as a disputed debt until such time that it becomes final and conclusive upon the disposal of the appeal. But then, the Court of Appeal in *Sri Jeluda Sdn Bhd v Pentalink Sdn Bhd* has already jettisoned the *Solid Kitchen* jurisprudence, if I may call it that.

[46] Hence, applying the approach by the Court of Appeal in *Sri Jeluda Sdn Bhd* and the *Pacific & Orient Insurance Co Bhd v Muniammah a/p Muniandy* it would appear that there is no scope for categorisation of a debt arising under a judgment as a disputed debt, albeit that the debt was being challenged on appeal.

[47] However, in as much as counsel for PKBSB was relying heavily on *Pacific & Orient Insurance Co Bhd* to assert that all disputes had merged in the judgment, it is important to note that in that case Ramly Ali JCA had said significantly and relevantly at p 959, that in the context of the second branch of the juridical basis for a Fortuna injunction, a judgment debt is indisputable, *unless set aside or stayed*. This is what he said:

> The second principle established in the Fortuna case is that an injunction of that nature may be granted in cases where a petitioner proposing to present a petition has chosen to assert a disputed claim, by a procedure which might produce irreparable damage to the company, rather than by a suitable alternative procedure.
>
> This principle applies only to disputed debt. It does not apply to cases where the debt in question is undisputed. As long as the debt cannot be disputed, it is not consequence (sic) whether or not it will cause irreparable damage to the company, if presented. A valid and enforceable judgment of court as in the present case, (unless set aside or stayed) cannot *be considered a disputed debt*. The law is settled on this point. Therefore, an order for injunction as prayed for by the appellant in the present case, also cannot be granted under this principle …

[48] In the result, based on the pronouncement by the Court of Appeal in *Pacific & Orient Insurance Co Bhd v Muniammah a/p Muniandy* on the status of a judgment order which has been stayed, the position is that if the judgment has been *stayed pending appeal*, then the debt is deemed as a disputed debt.

Consequently, any winding up based on that judgment would be an abuse as it would *tantamount to winding up based on a disputed debt.*

[49] As I mentioned earlier, with the stay order in place, PKBSB as the judgment creditor is precluded from any form of execution in order to lay its hands on the assets of SSSB. However, if PKBSB is permitted to wind up SSSB, then taking their argument to its logical conclusion, upon the winding up of SSSB, PKBSB would have to stand in line with other creditors and be paid out of the assets of SSSB *pari passu* with other unsecured creditors in accordance with the rules of priority of payment.

[50] So in a circuitous way, it would appear that if they are allowed to present a winding up petition and SSSB is wound up then PKBSB would eventually be laying its hands on the assets of SSSB and all this notwithstanding that there is a stay order in place and an appeal against the judgment which is pending.

[51] Based on the circumstances of this case, I was satisfied that the 218 notice and the threat of winding up proceedings had only one purpose, which is to coerce SSSB into paying the amounts ordered under the judgment. That, coupled with the fact that there is a stay order, clearly constitutes an abuse of process, warranting intervention by this court.

[52] To conclude the point, I take the view that, once a stay order has been granted, the judgment and the debt that arises there under is metaphorically speaking, put in suspended animation, save for the limited avenue of a winding up petition being presented at the behest of the judgment creditor, unless sooner restrained by a Fortuna injunction.

[53] In the light of the principle established by the Court of Appeal in *Pacific & Orient Insurance Co Bhd v Muniammah a/p Muniandy* on the status of a judgment debt which has been stayed, the position in law is that a Fortuna injunction may be granted (under the second branch of its juridical basis) since a judgment debt which has been stayed can properly be construed as a disputed debt.

[54] Also, I was mindful of the fact that if a Fortuna injunction is disallowed, then that would result in incongruity and would not be in keeping with the comity of judicial orders and a decision to disallow a Fortuna injunction, would in my view render the stay order given by the other court as an inefficacious and impotent judicial pronouncement. Such an outcome should wherever possible, and depending in the circumstances, be avoided.

[55] The grant of a Fortuna injunction on the facts and circumstance of the present case, will ensure that such incongruity will not present itself. Further,

the fact that special circumstances have been shown and a stay order had granted by the other court is not without significance and is a relevant factor to be considered in the present application.

[56] As I have mentioned earlier, with the stay order in place, the judgment is for all intents and purposes in a state of suspended animation. It is obvious enough that the stay order essentially seeks to maintain the status quo vis a vis the assets of SSSB whereas PKBSB, with its avowed intention of winding up SSSB seeks to change the status quo. In any event, whether that is PKBSB's intention or not, any winding up of SSSB will definitely change the status quo of SSSB. In this regard, it is apposite to bear in mind that there is an appeal pending against the very judgment that formed the basis of the 218 notice.

[57] Hence, if PKBSB is allowed to present the winding up petition and SSSB is thereafter wound up and the appeal to the Court of Appeal eventually succeeds, SSSB may not be restored to status quo. The damage to SSSB consequent upon winding up would (*or may quite possibly*) be irreparable and it would idle to speak of any restoring of status quo as it may be forever altered by the winding up. These are important and imperative considerations that must be kept in mind in dealing with an application of this type.

[58] Lastly, I have not lost sight of the relevant fact that SSSB, albeit armed with a stay order, would not be able to do anything with the asset that it owns ie a parcel of land which has been indisputably valued at approximately RM11,050,000 whereas the debt under the judgment is RM1,696,862.70 (*excluding interest and costs*). Also, the title to the land is held by PKBSB. Further PKBSB has entered a private caveat over the land which remains on the title until the present date and are therefore adequately protected vis a vis the asset of SSSB.

THE OUTCOME AND ORDER

[59] Having regard to the substratum of facts as may be gleaned from the affidavits and having considered the submissions and the principles of law as set out above, it is my view that, based on the peculiar and particular facts of this case, there are compelling grounds for the exercise of the court's discretion to maintain the status quo by way of an injunction to restrain the presentation of a winding up petition pursuant to the 218 notice which is in turn premised on the judgment.

[60] I therefore ordered, on an undertaking as to damages given by SSSB (the plaintiff) through its counsel, that PKBSB (the defendant), its agent and servants be restrained forthwith from presenting any winding up petition against SSSB pursuant to or in reliance of the said notice of demand dated

31 January 2013 pending the disposal of SSSB's appeal to the Court of Appeal ie Civil Appeal No P-02–2936–12 of 2012.

[61] I also ordered that the cost of this application be fixed at RM5,000 and is to be costs in the course of the appeal. Parties were given liberty to apply in the event of any change in circumstances. The penal endorsement (Form 183) was ordered to be included in the order granted herein.

[62] Order accordingly.

Application allowed with costs in course of appeal.

Reported by Kanesh Sundrum